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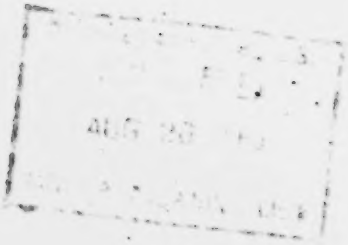

No. 269

In the Supreme Court of the United States

OCTOBER TERM, 1960

BOROUGH OF EAST NEWARK AND RAYMOND J. OTIS, AS TRUSTEE IN BANKRUPTCY OF FIDELITY TUBE CORPORATION, BANKRUPT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the Court of Appeals (Pet. A–3–34) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1960. (Pet. A–2a.) The petition for a writ of certiorari was filed on July 26, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a trustee in bankruptcy is a "judgment creditor" within the meaning of Section 3672(a)

of the Internal Revenue Code of 1939, so that unfiled federal tax liens are not valid against him.

2. Whether the United States obtains a tax lien upon a bankrupt's property where the tax is assessed before, but demand for payment is not made until after, the adjudication in bankruptcy.

STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 3670. PROPERTY SUBJECT TO LIEN.
>
> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.
>
> (26 U.S.C. 1952 ed., Sec. 3670.)
>
> SEC. 3671. PERIOD OF LIEN.
>
> Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.
>
> (26 U.S.C. 1952 ed., Sec. 3671.)
>
> SEC. 3672 [as amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.
>
> (a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any

mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

* * * * *

(26 U.S.C. 1952 ed., Sec. 3672.)

Bankruptcy Act, c. 541, 30 Stat. 544:

Sec. 70 [as amended by Sec. 23(e), Act of July 7, 1952, c. 579, 66 Stat. 420]. *Title to property.*

* * * * *

c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

* * * * *

(11 U.S.C. 1952 ed., Sec. 110.)

STATEMENT

The Fidelity Tube Corporation was adjudicated a bankrupt on February 9, 1954 (Pet. A–3). The United States filed a claim in the bankruptcy proceedings for unpaid federal unemployment, withholding, and social security taxes. It claimed a lien

for two of these categories. In one category both assessment of the tax and demand for its payment had been made prior to adjudication in bankruptcy; in the other category the tax had been assessed before, but payment was demanded after, bankruptcy (Pet. A–3–4). Neither lien had been recorded prior to the bankruptcy adjudication.

The Referee in Bankruptcy held that the unrecorded federal tax lien was not valid as against the trustees in bankruptcy (Pet. A–4), but the district court reversed (Pet. A–43–48). The court of appeals affirmed the district court (Pet. A–35–42) and, on rehearing *en banc*, two judges dissenting, the court filed a new opinion which again affirmed the district court (Pet. A–3–34). The court held (1) that a trustee in bankruptcy is not a "judgment creditor" within the meaning of Section 3672(a) of the Internal Revenue Code of 1939, and that the federal tax lien, although not recorded, has priority over the trustee's claim; and (2) that the federal lien attached upon the assessment of the tax, even though demand for payment was not made until after bankruptcy.

ARGUMENT

1. Section 3672(a) of the Internal Revenue Code of 1939 (*supra*, pp. 2–3) provides that a federal tax lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector * * *." The ruling below that a trustee in bankruptcy is not a "judgment creditor" within the purview of this section is in full accord with the pertinent decisions

of this Court and of the lower federal courts, and is clearly correct, and there is no occasion for further review.

In *United States* v. *Gilbert Associates,* 345 U.S. 361, this Court ruled (p. 364) that "Congress used the words 'judgment creditor' in § 3672 in the usual, conventional sense of a judgment of a court of record * * *." See, also, the concurring opinion of Mr. Justice Jackson in *United States* v. *Security Trust and Sav. Bank,* 340 U.S. 47, 52, cited in *Gilbert Associates* at p. 364 ("The history of this tax lien statute indicates that only a judgment creditor in the conventional sense is protected"); cf. *United States* v. *Scovil,* 348 U.S. 218, 221 (landlord not a "purchaser" under Section 3672, since "purchaser" there "means one who acquires title for a valuable consideration in the manner of vendor and vendee"). The holding below is also in accord with the decisions of the three other circuits that have considered this question, and with several district court decisions. *United States* v. *England,* 226 F. 2d 205 (C.A. 9); *Brust* v. *Sturr,* 237 F. 2d 135 (C.A. 2); *In re Taylorcraft Aviation Corp.,* 168 F. 2d 808, 810 (C.A. 6); *In the Matter of Green,* 124 F. Supp. 481 (N. D. Ala.); *In re Ann Arbor Brewing Co.,* 110 F. Supp. 111 (E.D. Mich.); see, also, *United States* v. *Hawkins,* 228 F. 2d 517 (C.A. 9.) There are no conflicting court of appeals decisions.[1]

[1] Prior to *Gilbert Associates*, the Second Circuit, although giving the federal tax lien priority over the trustee's claim on another ground, had ruled that a trustee in bankruptcy was a judgment creditor under Section 3672. *United States* v. *Sands,* 174 F. 2d 384. Subsequent to *Gilbert Associates* and in reliance

The fact that Section 70(c) of the Bankruptcy Act (11 U.S.C. 1952 ed., Sec. 110 (c), *supra*, p. 3) provides that, as of the date of adjudication in bankruptcy, the trustee "shall be deemed" to have all the rights of a judgment creditor, does not make him a "judgment creditor" within the meaning of Section 3672 of the 1939 Code. For the two provisions are designed to achieve different purposes, and the rationale of Section 70(c) that the trustee should be treated as a judgment ~~creditor~~ creditor in order to enable him to marshal the bankrupt's assets for the benefit of creditors, is not applicable to the different problem of federal tax lien priorities that is dealt with in Section 3672. A trustee in bankruptcy, even though treated for some purposes as if he were a judgment creditor, is not such "in the usual, conventional sense of a judgment of a court of record" (*Gilbert Associates, supra*).

2. The court below also correctly held that the United States has a lien for the portion of the tax that was assessed before bankruptcy, even though payment was not demanded until after adjudication. The same conclusion was reached by the Second Circuit in *Brust* v. *Sturr, supra,* at p. 136, and there are no conflicting court of appeals decisions.[2]

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thereon, however, the court reached the contrary conclusion in *Brust* v. *Sturr, supra.*

[2] *United States* v. *Beaver Run Coal Co.*, 99 F. 2d 610 (C.A. 3), upon which petitioners rely (Pet. 15–16), did not involve this question. The issue there was whether the United States was entitled to priority over the claim of a mortgagee where, although the taxes had been assessed prior to the execution of the mortgage, no notice of the tax lien had been filed until subsequent to its execution. The court ruled against the United States, on the ground that it had not complied with the pred-

Section 3671 of the 1939 Code (*supra*, p. 2) expressly provides that, unless another date is specifically fixed by law, the federal tax lien "shall arise at the time the assessment list was received by the collector * * *." The Bankruptcy Act does not specifically fix another date. On the contrary, Section 67(b) thereof (11 U.S.C. 107(b)) provides that statutory liens for taxes and debts owing to the United States, even though arising or perfected while the debtor is insolvent and within four months prior to the date of the filing of the bankruptcy petition, are valid; and that where such liens are required by federal or local law to be perfected, and arise but are not perfected before bankruptcy, they are valid if perfected within the time permitted by such laws. See 9 Mertens, *Law of Federal Income Taxation* (Rev. 1958), Section 54.29; Section 54.40, fn. 44; Plumb, *Federal Tax Collection and Lien Problems* (Second Installment), 13 Tax L. Rev. 459, 488 (1958). While both assessment and demand must be made for the tax lien to be effective, no formal demand is required. Here the United States made a sufficient demand by filing its claim in the bankruptcy proceedings. Cf. *United States* v. *Ettelson*, 159 F. 2d 193 (C.A. 7), holding that the filing of a claim for taxes against an estate in a probate court was sufficient demand. The court below properly held that the formal demand for payment, made after bankruptcy, related back to the time of filing the claim. Cf. *Macatee, Inc.* v. *United States*, 214 F. 2d 717 (C.A. 5).

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ecessor to Section 3672, since it had not filed its tax lien before the mortgage was recorded.

CONCLUSION

The decision below is in accord with the pertinent decisions of this Court and lower federal courts, it is correct, and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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